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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

Number 450

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ROBERT L. DOUGLAS, ALBERT R. GUNDECKER, EARL KALKBRENNER, CARROL CHRISTOPHER, VICTOR SWANSON, NICHOLAS KODA, CHARLES SEDERS, ROBERT LAMBORN, and ROBERT MURDOCK, JR.,
Petitioners

v.

CITY OF JEANNETTE (Pennsylvania), a municipal corporation, and JOHN M. O'CONNELL, individually and as Mayor of City of Jeannette (Pennsylvania),
Respondents

■

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

HAYDEN C. COVINGTON
Attorney for Petitioners

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

The above named petitioners present this their petition for writ of certiorari and show unto the Supreme Court of the United States as follows:

A

Summary Statement of Matters Involved

1. *Preliminary Statement.*

Although the ordinance involved in this case is the same kind as that considered in *Jones* v. *City of Opelika*,

62 S. Ct. 1231, Nos. 280, 314 and 966, October Term 1941, this case is not controlled by said decision of this Court because this case comes within the exception announced in the *Jones* case in that the ordinance, by its terms and as applied provides an exorbitant, excessive and burdensome license tax of $10.00 per day or $3650.00 per annum, for the exercise of the constitutional right of press and worship in the city from house to house.[1] The license tax is therefore prohibitive and an unconstitutional burden on freedoms of press and of worship. However, if it be assumed that petitioners have a controversy under the section of the ordinance requiring the payment of $1.50 daily tax the ordinance nevertheless provides for a burdensome tax upon charitable activity from which no profit or commercial income is received.

2. *Statutory Provision Sustaining Jurisdiction.*

Section 240 (a) of the Judicial Code, 28 U. S. C. A. ¶ 347 (a) sustains jurisdiction of this Court.

3. *Validity of the City Ordinance and the State Statute Drawn in Question.*

The legislation here drawn in question is ordinance number 60 of the City of Jeannette, Pennsylvania (R. 8, 92, 101, 138, 144, 150-n.), which reads as follows:

"City of Jeannette, Pa.
Ordinance No. 60

An Ordinance regulating the canvassing for or soliciting of orders for goods, paintings, pictures, wares or merchandise of any kind within the Bor-

[1] Section *one* of the ordinance providing for payment of a tax of $1.50 per day applies only to *canvassing and soliciting* of orders or delivering under orders and does not apply to *peddling or huckstering*. It is not contended that petitioners solicited *orders*. They were prosecuted for peddling and huckstering without payment of the $10.00 daily license. See record in *Stewart v. Jeannette*, 309 U. S. 674, 680, No. 722, October Term 1939, certiorari denied.

ough of Jeannette, and the delivery of such articles under orders so obtained or solicited and requiring all person or persons so engaged in canvassing, soliciting or delivering, to first procure from the Burgess a license to transact said business, and also regulating the hawking, vending of fruits and other merchandise upon the streets by public outcry or by solicitation and requiring all person or persons thus engaged to first obtain a license from the Burgess.

Be It Ordained and enacted by the Borough of Jeannette in Council assembled and it is hereby ordained and enacted by the authority of the same.

Section I. That all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact such business and shall pay to the Treasurer of said Borough therefor the following sums according to the time for which said license shall be granted.

For One day $1.50, for One week seven $7.00 dollars, for two weeks twelve $12.00 dollars, for three weeks twenty $20.00 Dollars, provided that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers doing business in said Borough of Jeannette.

Section II. That all persons huckstering, peddling, or selling fruits, goods or other merchandise upon the streets of said Borough by outcry or solicitation of the people upon the streets or thoroughfares of said Borough shall be required to procure from the Burgess a license to transact said business and shall pay to the Treasurer of said

Borough therefore, the sum of ten $10.00 Dollars per day. Any person or persons failing to obtain a license as required by this ordinance shall, upon conviction before the Burgess or Justice of the Peace of said Borough forfeit and pay a fine not exceeding one hundred $100.00 Dollars, nor less than the amount required for the license for such person or persons together with the costs of suit, and in default of payment thereof, the defendant or defendants may be sentenced and committed to the Borough lock-up for a period not exceeding five (5) days or to the County Jail for a period not exceeding thirty (30) days.

Adopted by the Town Council of the Borough of Jeannette this first day of March, A. D. 1898.

D. E. Carle, President of Council.

Attest: Geo. S. Kirk, Secretary.

I, J. Claire Manson, City Clerk, of the City of Jeannette, Pennsylvania, hereby certify that the foregoing is a true and correct copy of Ordinance No. 60 of the Borough of Jeannette (now the City of Jeannette), Pennsylvania.

J. Claire Manson, City Clerk."

[Seal]

4. *Date of Judgment and Order to be Reviewed.*

The decree or judgment of the United States Circuit Court of Appeals for the Third Circuit reversing the judgment for petitioners by the United States District Court and ordering the action dismissed was duly rendered and entered on August 31, 1942. Time for filing petition for certiorari expires November 30, 1942. This petition is filed within that time.

5. *Time and Manner in which Questions Raised Below.*

In the complaint for injunction petitioners alleged

that the ordinance as construed and applied was unconstitutional because of abridging their rights of freedom of press and of worship of Almighty God. (R. 9) See particularly paragraph seventeen of the complaint. (R. 11) It was alleged that they were deprived of their rights without due process of law and in violation of the Civil Rights Act of 1871. (R. 3, 10) The answer denied that the ordinance had been unconstitutionally applied and denied that the petitioners had been denied any rights contrary to the Federal Constitution. (R. 20) The trial court considered the federal questions properly presented and held that the ordinance had been applied in such a manner as to violate the Federal Constitution. (R. 137, 142) The United States Circuit Court of Appeals held that the federal questions had been properly raised and presented, both in the trial court and in said appellate court, and held that the ordinance was constitutional. R. 160, 161, 163.

6. *Opinions of the Courts Below.*

The opinion of the United States District Court is reported in 39 F. Supp. 32. The opinion of the District Court in the companion case of *Reid et al.* v. *Brookville et al.* is reported in 39 F. Supp. 30. The opinion of the United States Circuit Court is unreported at the time of writing of this petition, but appears in the record at pages 149 to 169, inclusive.

7. *Statement of Facts.*[2]

Petitioners brought this action in the United States District Court for the Western District of Pennsyl-

[2] The record consists of 212 pages of evidence, most of which relates to income and disbursements made by petitioners in carrying on their work in Jeannette. This Court in the *Jones* v. *Opelika* case says: "If the size of the fees were to be considered, to reach a conclusion one would desire to know the estimated volume, the margin of profit, the solicitor's commission, and other pertinent facts of income and expense." We have questioned the amount of the tax here and the court's new requirement makes necessary a detailed statement of facts here, which will be longer than is ordinarily made.

vania, under the Civil Rights Act as amended in 1871 [8 U. S. C. A. s. 43] to restrain interference by respondents with petitioners' exercise of their fundamental personal right to distribute literature and simultaneously receive money contributions to aid in printing and distributing more like literature from house to house and upon the streets within the City of Jeannette, alleging that respondents had repeatedly harassed, arrested, prosecuted, unlawfully convicted and unlawfully forced petitioners and other of Jehovah's witnesses to appeal said convictions to the Court of Quarter Sessions of Westmoreland County, thence to the Superior and the Supreme Courts of the Commonwealth; all of which greatly damaged and injured petitioners and other of Jehovah's witnesses and frustrated and practically stopped the lawful activity of Jehovah's witnesses in the exercise of their rights of freedom of speech and of press and freedom to worship ALMIGHTY GOD, causing petitioners to suffer irreparable injury and damage in future unless enforcement of said ordinance was enjoined. R. 3-14.

CHARLES R. HESSLER testified that he is a resident of Coraopolis, Pa., and a native citizen of the Commonwealth; that his occupation was an ordained minister of Jehovah God, representing the Watch Tower Bible & Tract Society in the capacity of a zone servant; that the Watch Tower Bible & Tract Society is a corporation created under the laws of Pennsylvania for the purpose of disseminating Bible truths in various languages by means of tracts, books, booklets and other lawful means. (R. 23) That Jehovah's witnesses are Christian men and women, ordained ministers of the gospel, wholly and entirely devoted to the service of Almighty God and have covenanted with Jehovah to serve Him and to do His will and to follow in the footsteps of Christ Jesus by preaching from house to house;

that the Watch Tower Bible & Tract Society is used by Jehovah's witnesses as publishers to assist them in disseminating Bible truths and to preach the gospel. Plaintiffs-petitioners and all other Jehovah's witnesses possess credentials showing that they are duly ordained to preach the gospel and to represent the Watch Tower Bible & Tract Society. See Petitioners' Exhibit No. 38. (R. 24) That Jehovah's witnesses throughout the earth are organized into groups where they as groups and as individuals co-operate with one another for the purpose of preaching the gospel and taking to the people information concerning God's kingdom in an efficient and orderly manner. That Jehovah's witnesses visit the people in different communities at regular intervals to call upon them with the message of the Kingdom, using phonographs to present the books and booklets and to encourage and stimulate home Bible study. That each one of Jehovah's witnesses is an ordained minister of Almighty God. That Jesus Christ taught publicly on the streets and from house to house, and that His apostles also taught publicly and preached from house to house, and that all true followers of Jesus Christ in the present day are commissioned, anointed and ordained as ministers of Jehovah God for the sole purpose of preaching the gospel from house to house and publicly. Isaiah 61: 1, 2; Isaiah 43: 9-12; Matthew 10: 7-12; Matthew 24: 14; Acts 20: 20; 1 Peter 2: 21; 1 Corinthians 9: 16. That in order to do the work quickly and efficiently books and booklets in various languages are employed instead of conversation, in order to save time and enable people at their leisure to study in their homes and learn for themselves. That the work of Jehovah's witnesses has been carried on for many years in Jeannette; that in March, 1939, while Jehovah's witnesses were distributing literature from house to house and receiving money contributions they were arrested and

warned to discontinue the work or otherwise they would be prosecuted under Ordinance No. 60.

Thereafter, on April 2, 1939, plaintiffs delivered a letter to the police and mayor of Jeannette, explaining the nature of their work and showing why the ordinance did not apply to them, which said letter appears in the record. (R. 28-9) That on the date of delivery of said letter several of Jehovah's witnesses were again arrested and this time complaint was filed in the Mayor's Court of the City of Jeannette, charging them with violation of said ordinance for failure to purchase a peddler's license. That on such date Hessler advised defendant O'Connell that Jehovah's witnesses had no objection to the ordinance as a commercial ordinance, but objected to its being misapplied to their work of preaching the gospel.

That on April 2, 1939, twenty-one of Jehovah's witnesses were arrested, and 18 were tried and convicted and forced to appeal to the Court of Quarter Sessions. That on a subsequent appeal to the Pennsylvania Superior Court from the Court of Quarter Sessions petitioners' failure to have attached to original appeal papers a certified copy of the mayor's transcript resulted in dismissal of that appeal [137 Pa. S. C. 445; 9 A. 2d 179], and from there the case was taken to the Supreme Court of the Commonwealth [137 Pa. S. C. XXXIII] and then to the Supreme Court of the United States, where certiorari was denied [309 U. S. 674, 699], because decided on non-federal ground.

That since April, 1939, to wit, in February, 1940, there were a number of prosecutions and convictions of Jehovah's witnesses under said ordinance and appeals to the Court of Quarter Sessions, where those cases are now pending. That there have been more than thirty (30) arrests since the original twenty-one arrests.

Petitioners' Exhibits 3 to 10 inclusive were books

published by the Watch Tower Bible & Tract Society and distributed by Jehovah's witnesses in Jeannette.

Petitioners' Exhibits 11 to 36 inclusive were booklets and pamphlets distributed by Jehovah's witnesses in Jeannette.

The witness explained the manner in which the work was carried on in Jeannette, to wit, that Jehovah's witnesses visited the home, rang the bell or knocked, and when a person came to the door the caller said, 'I represent the Watch Tower Bible & Tract Society' or 'I am one of Jehovah's witneses, and we have very important information for you in the form of a phonograph record which I will play, and it will take only a few minutes for you to hear it.' Whereupon the caller demonstrated with a portable phonograph and played Plaintiffs' Exhibit 37. At conclusion of playing of phonograph record the householder was asked whether he liked the record, and then a card was presented for him to read, explaining how he may obtain "The Watchtower", published twice a month, and if he did not care to take "The Watchtower" then attention was called to the fact that one of the bound volumes could be secured on a contribution of twenty-five cents. That on the occasion of the first arrests Jehovah's witnesses were distributing the two booklets "Face the Facts" and "Fascism or Freedom", taking a contribution of five cents from persons receiving the two booklets, and to any who did not care to contribute and desired the booklets copies were given free. That he was in Jeannette at the time of the arrests in April, 1939.

That the reason Jehovah's witnesses did not apply for a permit or purchase a license under the ordinance was because they were *not* peddlers but ministers of Jehovah God doing this work in obedience to His explicit command, and for them to ask for a permit to do what Jehovah has commanded would be an insult to the

Creator, as His law is supreme and above all human law. That repeatedly and on several occasions after April 2, 1939, throughout the year 1939 and throughout the year 1940, up to the time that this action was filed, the witness had many conversations with the defendant O'Connell, impleading with him not to interfere with Jehovah's witnesses and to discontinue arresting them under the ordinance; but that the mayor always insisted that the law was valid and that they would continue to enforce it as long as Jehovah's witnesses distributed literature from house to house in Jeannette and accepted money contributions.

That the repeated arrests and prosecutions have curtailed the work of Jehovah's witnesses, intimidated people of good-will who reside in Jeannette, causing such persons to be afraid to accept any literature offered by Jehovah's witnesses, and caused the company of Jehovah's witnesses to diminish and move away from the community and avoid working in the community.

That Hessler had personal charge of the defense of all cases, and that the expense of defense and appeal of the various cases has amounted to over $1,700.00 (R. 67-69), in addition to hundreds of dollars of expense incurred by individuals for travel costs and inconveniences and damage through loss of jobs and reputation.

The evidence shows that the full-time servants such as Hessler received a $25.00 maximum allowance for incidental personal and travel expenses, but no salary or commission is paid. (R. 42-45) The Society receives 5c each on books sent to the full-time worker. If a contribution of 25c is received there is a difference of 20c which the full-time worker uses toward expenses. (R. 44) They do not always receive any contributions when the books are placed, as more often the books are left free of charge. (R. 44) They give more books and booklets away free than the number for which contributions

are received. (R. 44) The amount of contributions runs for each between $2 and $4 per month (R. 45) and the profit or differential on each book placed would be much less than that because of sending in to the Society the amount charged for each book received. (R. 44-45) All remuneration from all sources for the full-time worker does not exceed $40 per month, including the $25.00 monthly allowance. (R. 46) The expenses for operation each month run between $60 and $85 per month, which includes cost of books given away and those for which contributions are received. (R. 48) The difference between income and outgo is taken from reserve fund which the witness, Hessler, had before going into the work. (R. 49) In the case of the part-time worker who usually has secular employment during the week to support himself the literature is provided by the Society at less than cost price of publication or 20c each book. The books are received by the part-time publisher from his local company or group congregation that receives them directly from the Society. If the part-time publisher receives a contribution of 25c for a book he retains a difference of 5c which is applied toward his expense of bringing literature to the people and toward the cost of books which he distributes freely to the people. (R. 49-50, 75) Because many books are given away by each part-time publisher or worker and because of the expense in bringing the literature to the people no profit is made by the part-time worker—he also operates at a loss. (R. 49-51; 106-108) A *company* is an organized group or gathering of Jehovah's witnesses numbering from two to two hundred or more. (R. 54) The companies pay the Watchtower Society for each book received the sum of 20c. R. 49-51, 75.

Because of the great persecution and difficulties experienced by petitioners around Pittsburgh in western Pennsylvania they had organized a non-profit

charitable corporation for purpose of operating a Kingdom School to provide suitable education for their children who had been expelled from public schools because of their refusal to salute the American flag. This organization was known as Kingdom Service Association and was used also to finance some of the major legal cases and difficulties in western Pennsylvania, including the Jeannette controversy. (R. 69) The association kept records. (R. 69-71, 78-81) Its income is entirely from voluntary contributions of Jehovah's witnesses. It did not make a profit off of the preaching activity and received no commission or income whatsoever from any books placed by Jehovah's witnesses. R. 69, 75, 79-83, 106-114, 125-129, 133.

The books of one of the companies or local organizations were produced in court. It contained a record of the books placed with each member of the local congregation by the local office. The figures for one month demonstrate the account. The book account showed $398.14 total for the month including a carry over of $142.42 from the month before with $237.91 disbursements for that month. Another month shows a total at the end of month of $484.81 including a $162.73 carry-over from the previous month. (R. 116-121) The local company was required to pay for telephone rental and for rental of a hall in the amount of $100 per month not shown in the above account. (R. 120) No individual receives a profit or salary from the work. The company pays the Society 20c each for books received (R. 121), and charges each member of the company 22c each; the difference between which, 2c, was used for partial payment of the damage, shipping and deterioration of the books, etc. (R. 121, 123-125) The company owes the Watch Tower Bible & Tract Society a balance of $1300 for books. (R. 125-128) The amount of money received each month for books does not take care of

the operating costs, rent, telephone, etc., which deficit is taken care of by voluntary contributions of members of the company. (R. 126) The inventory taken showed $520 worth of books on hand and a large account receivable from various members for books placed to Jehovah's witnesses in the company. R. 128-129.

That the reason Jehovah's witnesses did not apply for a license or pay the peddler's tax required under the ordinance was because they were not peddlers but ministers of Jehovah God doing this work in obedience to His explicit command, and for them to ask for a permit to do what Jehovah has commanded would be an insult to the Creator, as His law is supreme and above all human law. R. 39.

B

Questions Presented

By reason of the foregoing, there were seasonably presented to the courts below and there now are presented to this Court for review substantial federal questions as follows:

(1) Is the ordinance in question unconstitutional on its face and as construed and applied because imposing a tax excessive, exorbitant and prohibitive in amount of $10.00 daily or $3,650 annually in one section and in another section for a daily tax of $1.50, or $547.50 annually, upon the constitutionally secured rights of freedom of press and of worship?

(2) Does the ordinance as construed and applied unduly abridge petitioners' rights of freedoms of speech, of press and of worship of Almighty God contrary to the First and Fourteenth Amendments to the United States Constitution?

(3) Does the ordinance as construed and applied violate the *equal protection* and *due process* clauses of the Fourteenth Amendment to the United States Con-

stitution by reason of discrimination against petitioners in favor of other persons in the same class?

(4) Did the United States District Court have jurisdiction of the cause?

C

Reasons Relied on for Allowance of Writ

The questions presented are of national importance and seriously affect the fundamental personal and civil rights of every person within the United States. The Circuit Court of Appeals has rendered a decision on an important federal question in a way which is in conflict with applicable decisions of this Court involving this kind of an ordinance under the Constitution and has radically and so far departed from the accepted and usual course of judicial proceedings in federal courts as to call for an exercise of this Court's power of supervision to halt the same.

The Circuit Court of Appeals has decided an important question of federal constitutional law which has not been heretofore decided; that is to say, the question as to just when the size of the tax becomes a substantial clog upon activities of the sort here involved. (*Jones* v. *Opelika*, 62 S. Ct. 1231) Here it is "distinctly claimed" that the taxes are excessive, exorbitant and burdensome upon the constitutional rights exercised by petitioners. The record is full of facts showing the income and expense, the estimated volume, the margin of profit, etc., which this Court says "one would desire to know". The entire record shows no profit, that the contributions do not exceed the expense, that the work is charitable and done at a loss to petitioners and for the benefit of the public and those receiving the literature. The record therefore shows a "substantial clog" and brings the work within the exception announced in the *Jones* case. The record and petition here expressly

raise this important question which this Court did not see fit to pass upon or consider in the *Jones* case because there not "distinctly claimed" to be excessive in amount. This case will give this Court an opportunity to clarify just what it meant by "substantial clog" in the *Jones* case. It is further submitted that, in view of the record, the Circuit Court of Appeals has departed from the spirit of the exception announced in the *Jones* case. Of course this problem need not be considered if the Court grants the motion for rehearing in the *Jones* case and holds unconstitutional the ordinances there requiring a license tax in any amount when applied to this sort of activity. However, if the court does not grant the motion in the *Jones* case and lets the doctrine in the *Jones* case stand as the law, such decision would not require the denial of certiorari here because the question here presented is entirely different from that presented in the *Jones* case in that here is presented the question of excessive, exorbitant and burdensome tax that is a "substantial clog". We still insist that the majority opinion in the *Jones* case is *error* and that the minority opinions should be adopted as the law.

The effect of the holding in the *Jones* case is to push "inalienable rights" of freedom of speech, press and worship into the path of the devastating taxation machinery of the state and federal governments, because of the fact that if taxation is properly applicable to an activity the famous proverb of liberal-minded lawyers of the early stages of democracy applies, to wit, "the power to tax is the power to destroy." (*McCulloch* v. *Maryland*, 4 Wheat. 316) In this connection the Court's attention is called to the fact that it has universally been the rule of this Court for more than a hundred years that if a given activity is held to be taxable to any extent whatsoever, it is utterly impossible for the courts to inquire whether or not a tax is excessive or

burdensome, even to the extent of becoming prohibitory and destructive. We refer to the cases of *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Bailey* v. *Drexel* ("Child Labor Tax Case"), 259 U. S. 20. Therefore the Court's holding to the effect that the tax should be attacked as excessive is without merit.

The holding of the Circuit Court of Appeals conflicts with the cases cited in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 55-57, involving the same sort of ordinance. That holding also conflicts with the case of *Commonwealth* v. *Reid*, . . Pa. S. C. . ., 20 A. 2d 841, involving activity of Jehovah's witnesses under an ordinance very similar to this which provided for the payment of a license tax. See also *McConkey* v. *Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682, *State* v. *Greaves*, 112 Vt. 222, 22 A. 2d 497, *Blue Island* v. *Kozul*, 379 Ill. 511, 41 N. E. 2d 515.

The court below holds that the ordinance in question was constitutional when applied to persons receiving money contributions for literature distributed. This holding clearly discriminates in favor of a wealthy and well-to-do class of persons who are able to give away literature without charge and thus enjoy their constitutional rights while it arbitrarily deprives persons too poor to carry on their work without contributions of their rights of freedom of press, speech and worship contrary to the *equal protection* and *due process* clauses of the Fourteenth Amendment to the United States Constitution. It thus arbitrarily and with discrimination divides the people into two classes: one class wealthy enough to exercise constitutional rights; and the other class too poor to purchase a *freedom license* or give away their broadsides free of charge. *Edwards* v. *California*, 314 U. S. 160, 182-186, JACKSON and DOUGLAS, JJ. This point of discrimination raised here

also distinguishes the case from the holding in *Jones* v. *Opelika*, supra. See *Barbier* v. *Connolly*, 113 U. S. 27, 31-32; *Truax* v. *Corrigan*, 257 U. S. 312, 331-333. In *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 39, this Court holds that this sort of an ordinance is "likely to be used as an instrument of discrimination".

See also the cases of *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494, 495, and *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 418, where it is said: "To tax the foreign corporations for carrying on business by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws." Also this Court holds that to levy a tax on corporations operating a taxicab business but not on individuals operating such a business results in a discrimination not justified by any difference in the source of the receipts or in the situation or character of the property employed, and is violative of the equal protection clause. *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389.

The holding of the courts below conflicts directly with the prior decision of this Court in the case of *Grosjean* v. *American Press Co.*, 297 U. S. 233.

The reluctance with which the Circuit Court of Appeals followed this court in the *Jones* case should be considered a good reason for granting the petition for writ of certiorari here. The Circuit Court of Appeals said: "In view of the fundamental importance of the question involved we think it not improper to say that Judge Biggs and the writer of this opinion in harmony with the views expressed by Chief Justice Stone and Justice Murphy and concurred in by Justices Black and Douglas in the case of *Bowden* v. *City of Fort Smith*, . . U. S. . . (decided June 8, 1942), would, if free to do so, vote to hold that the district court was right in concluding that the ordinance of the City of

Jeannette is unconstitutional as applied to the activities of the plaintiffs and their associates."

In brief, the writ here sought should be granted because the ordinance provides for an excessive tax upon constitutional privileges so as to constitute a "substantial clog", if not an outright prohibition of the exercise of the right in providing for payment of excessive sums or else give literature away free without receiving any aid. Regardless of the amount of the tax the ordinance imposes a substantial burden upon the right of press and worship of Jehovah God through stifling distribution and circulation of literature.

As our further reasons why this petition for writ of certiorari should be granted we submit that there is presented an important question of jurisdiction of the United States District Court and a question of construction of the Civil Rights Act of 1871. The judges of the Circuit Court of Appeals did not agree on this. Almost the entire part of Judge Maris' opinion is devoted to a discussion of the question holding in favor of jurisdiction of the court. Judge Jones files a dissenting opinion vigorously assailing the jurisdiction of the trial court.

It is submitted that this case is one calling for the exercise by the Court of its supervisory powers under Section 240 (a) of the Judicial Code [28 U. S. C. A. paragraph 347 (a)] and Rule 38, paragraph 5 (b) of Rules of this Court.

WHEREFORE your petitioners pray that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the decree of the Circuit Court of Appeals re-

versing the trial court be here set aside and the judgment of the trial court affirmed; and that your petitioners be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

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ROBERT MURDOCK, Jr.
Petitioners

By HAYDEN C. COVINGTON
Their Counsel of Record

SUPPORTING BRIEF

Specification of Errors

The petitioners assign the following errors in the record and proceedings of said cause:

The Circuit Court of Appeals committed fundamental error in affirming the judgment of the trial court because

(1) The ordinance in question provides for a prohibitive, exorbitant and excessive license tax of $10 per day for "peddling" literature and a tax of $1.50 per day for canvassing for orders of literature, amounting to a "substantial clog" upon petitioners' activities.

(2) The ordinance in question as construed and applied is void because it abridges petitioners' rights of freedom of speech, press and worship of Almighty God contrary to the First and Fourteenth Amendments to the United States Constitution.

(3) The ordinance in question as construed and applied denies petitioners their rights because of discrimination against them in favor of other persons in the same class contrary to the "equal protection" and "due process" clauses of the Fourteenth Amendment to the United States Constitution.

For each of the above reasons the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed and the judgment of the District Court affirmed.

ARGUMENT

The license tax here imposed provides for a burdensome and excessive amount upon the exercise of constitutionally secured inherent rights of freedom of speech, press and worship, heretofore held inalienable by this court. The evidence shows that of the petitioners the one whose full time is devoted to the activity carries on the activity at a financial loss to himself. The monthly deficit must be made up from a source other than receipts from placement of literature with the public. More than half the literature is given away free to the poor and others who were unable to contribute. Often contributions are received of less than the cost of manufacturing and distributing the literature, and the distributor very rarely receives a contribution for the full amount fixed by Jehovah's witnesses. The part-time worker likewise gives away most of the literature to the people and operates at a loss. The record here shows conclusively that the work is benevolent and charitable and is not commercial. If it were commercial work the literature would never be given away nor would the receiver be allowed to contribute any sum he desired when he receives the literature. The receiver would be required to pay the full price else not receive the literature, if the work were commercial.

The contributions thus received by Jehovah's witnesses are identical to the "free-will" offerings received by the clergyman when *his* contribution plate is passed. No reasonable person could contend that the hearer "bought" or "purchased" a sermon when thus contributing to the preacher; nor can it be contended that anyone "bought" the *printed* sermons distributed by the petitioners. They did not *sell* as that term is understood in commercial transactions or *circles*. A commercial business could not last long if operated on the

principles or by the methods employed by Jehovah's witnesses. The reason Jehovah's witnesses carry on as they do in spite of the loss to them financially is because their entire life is devoted to Jehovah God. Each has pledged *his all* to see that the people receive God's Word concerning the complete establishment of God's kingdom in the near future. Each considers it a privilege to devote his time and money in bringing the message to the people, even if it costs him his life or liberty; therefore, financial loss is a small thing compared to the other hardships they are willing to endure for the name of the Lord Jesus Christ. Jehovah's witnesses themselves keep the deficit suffered in their operations made up by voluntary contributions *themselves* and do not depend upon someone on the *outside* to bear their burdens. Therefore their work is entirely charitable and it cannot be honestly or fairly contended to be commercial. The record does not support a conclusion that the transactions are commercial or profitable.

The unfairness of the fixed license fee is demonstrated in this: It must be paid by one whose entire activity is charitable or who disfributes the literature freely and without charge. The taking of occasional contributions is considered by the court below as the basis for requiring each petitioner to obtain the license and pay the tax. This really permits a tax on giving away literature free of charge, and, furthermore, encourages unscrupulous police officers to swear falsely that the one arrested *offered* literature *for sale*, so as to obtain a wrongful conviction.

When it is considered that the total income of one whose full time is devoted to this work from the distribution of the literature is only about $4 per month, the imposition of a monthly tax of $300 provided by the ordinance is absolutely prohibitive. Even the imposition of the license tax of $1.50 per day would be grossly ex-

cessive when applied to the charitable activity of giving away free of charge most of the literature and receiving an occasional contribution. A fee or tax imposed in any amount is excessive in view of the fact that each of the petitioners carries on his work at a loss. The evidence shows a loss to each one of Jehovah's witnesses. To apply the tax is equal to taxing free distribution of literature. A license tax in amount unduly abridges petitioners' fundamental personal rights and is a "substantial clog" upon their activity. To permit the imposition of such a license tax is greatly to burden, if not destroy their work of going about the cities doing good unto all whom they meet as did Christ Jesus and His apostles.

To require one who distributes literature in this manner to refrain from accepting occasional money contributions toward his work of distributing literature would mean that the freedom of press and worship according to the dictates of one's conscience are the prerogative only of those able to give away literature free of charge. This sort of holding makes the constitutional fundamental personal rights the privilege only of the ultrarich and well-to-do who can well afford the more exclusive means of preaching such as the public press and the radio.

The above record here presents a situation where the tax is clearly a "substantial clog" on petitioners' activity. The record, evidence and account books show conclusively that there is no profit whatsoever that inures to the benefit of anyone. There is no paid preacher in any one congregation nor at headquarters. The tax, if imposed in any amount, is an excessive and prohibitory burden upon their constitutional rights as exercised. (*Jones* case, supra.)

The word "abridging" in the First Amendment needs discussion. The word "abridge" means to short-

en, to curtail or to reduce, and comes from the same root as the word "abbreviate". The word does not mean to destroy, forbid, prohibit or prevent. The use of the word "abridge" in the First Amendment may be compared to the word "burden". In order to show the ordinance invalid, it is not necessary to find that it denies, destroys or prohibits freedom of the press; but it is sufficient if it is found that the ordinance burdens this right. Admittedly the ordinance does and therefore is unconstitutional.

The license tax is an arbitrary tax upon the exercise of the constitutional right and more burdensome than the ancient *Stamp Tax*.[4] The license tax provides for a blanket amount to be paid as a condition precedent to the exercise of the right and does not depend on the income or profit made by the individual or the amount of business carried on in the city. It does not depend for its size or amount on the number of pieces of literature distributed for which money contributions are received. No provision is made for a reduction on the basis of the number given away free of charge. It is therefore the worst kind of burden or abridgment. It is condemned by previous decisions of this and other courts when applied to exercise of rights constitutionally secured.[5]

[4] For historical discussion of these oppressive taxes see *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Near* v. *Minnesota*, 283 U. S. 697, 707-716; the opinions of Chief Justice Stone and Justice Murphy in the case of *Jones* v. *Opelika*, supra; pages 20-25 of petitioners' motion for rehearing in the *Jones* case; and page 7 of American Newspapers Publishers Association amicus curiae brief filed in the *Jones* case.

[5] *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 55-57; *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 494-496; *Caldwell* v. *North Carolina*, 187 U. S. 622, 624-632; *Rearick* v. *Pennsylvania*, 203 U. S. 507, 510-513; *Dozier* v. *Alabama*, 218 U. S. 124, 126-128; *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325, 335-336; *Carson* v. *Maryland*, 120 U. S. 502; *Asher* v. *Texas*, 128 U. S. 129; *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *Brennan* v. *Titusville*, 153 U. S. 289; *Stockard* v. *Morgan*, 185 U. S. 27; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Rogers* v. *Arkansas*, 227 U. S. 401; *Stewart* v. *Michigan*, 232 U. S. 665; *Davis* v. *Virginia*, 236 U. S. 697.

The dissenting opinions of Chief Justice Stone and Justice Murphy in the *Jones* v. *Opelika* case are, we submit, the law of the land and this should be an appropriate occasion for this Court to correct the mistake made by the majority in the said case. It is never too late to be right and it is now the time to change over with the dissenting Justices in favor of liberty before the liberties of the people become so entangled with many varieties of precedents that will spring from the majority opinion against the liberty of the people that it will be impossible to recover the former position of the Court.* Respectable authority supports the dissenting Justices. See the cases of *Blue Island* v. *Kozul*, 371 Ill. 511, 41 N. E. 2d 515; *McConkey* v. *City of Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682; *State* v. *Greaves*, 112 Vt. 222, 22 A. 2d 497; holding the identical ordinance here questioned to be unconstitutional.

It cannot be fairly contended that the distributor can pass on to the *consumer* the additional burden imposed by reason of the license tax. The *consumer* is entitled to be free of the same burden as is the distributor. Freedom of press and of worship protects the conveyer of ideas as well as the receiver of ideas. Here in this case Jehovah's witnesses, the conveyors of ideas, are discharging their trust or obligation imposed as trustees for the receivers of the literature to urge in behalf of the *consumer* that the license tax is a burden on the receiver or consumer as well as on the

*The devastating consequences of the *Jones* case majority opinion are demonstrated in this case: Although the judges of the court held that they were of the opinion that the dissenting opinions correctly announced the law they were forced to follow the error of this Court in the *Jones* case. (R. 161; and see this brief page 17, supra.) So shocked were the members of the court below as a result of such compulsory violation of their view of the law that they entirely overlooked that the facts in this case fell within the exception of the *Jones* case, to wit, "excessive" taxes so as to amount to a "substantial clog". "Substantial clog" is now undefined by the court and needs clarification.

distributor. The entire avenue should be kept open for both the distributor as well as the receiver. In making this claim Jehovah's witnesses are not claiming a special privilege for themselves, but they are discharging to this court the responsibility which they owe as citizens of these United States and to this Court by clearly showing wherein this sort of license tax injures not only petitioners but also every citizen in the United States who might desire to pamphleteer on any matter: political, social or religious. Jehovah's witnesses do not claim that they are immune from all kinds of taxes. They pay income taxes; advalorem realty taxes on their homes; license taxes on their automobiles; sales taxes on their food, etc. However, the charitable organization which they use to preach the gospel is, like all religious organizations, exempt by statute from the payment of state and federal taxes of all kinds. None of the above taxes, as distinguished from the license taxes in the present case, have a prohibitory or censorial quality or operate as conditions precedent to the publication or circulation of literature explaining the Bible. The license tax, however, does that very prohibitive evil thing.

The ordinance in the case at bar cannot be distinguished from the ordinance knocked down in *Lovell* v. *Griffin*, 303 U. S. 444. There the license was condemned as an abridgment of freedom of the press even though the ordinance provided for the issuance of the license without the payment of any sum to the city of Griffin. It must be remembered that the ordinance was condemned in the *Lovell* case because of the requirement of a license and not the discretionary right to refuse to issue it. The case was not disposed of on such a narrow ground. We submit that if the requirement of a license without charge is invalid, and this Court admits it is, then the adding of a fee or tax thereto does not save it;

but such tax makes doubly objectionable the ordinance here questioned. It should be remembered that *license* was the favorite means of regulating the press before the Stamp Taxes were devised prior to the American Revolution. The license tax incorporates both those suppressive evils.

The case of *Grosjean* v. *American Press Co.*, 297 U.S. 233, is controlling here. There Louisiana imposed a two percent tax on the gross receipts of any newspaper, magazine, etc., engaged in selling advertisement in the state and having a circulation of more than 20,000 per week. It is to be remembered that that case was not decided on grounds of unfair discrimination but solely on the grounds that the tax was a direct burden upon distribution or circulation and thereby was an unconstitutional *abridging* of the freedom of the press. The same conclusion should be reached here.

There is a much more important ground involved, i. e., the ordinance as construed and applied abridges the right of freedom of worship of Almighty God. This sacred and unalienable right of freedom of worship has been denied and prohibited petitioners. The undisputed evidence shows that this is the petitioners' way of worship of Almighty God. This can be denied by no one. The contributions were admittedly free-will offerings to further the good work of spreading the gospel of God's kingdom. The contributions cannot be considered as commercial income. These activities cannot be viewed by this Court as "commercial" nor can the methods used be likened to those employed by commercial businesses. The evidence shows that there is a loss to petitioners to carry on this work, and that it is charitable.

The construction of the ordinance so as to cover the activity of petitioners is the same as wording the ordinance to read "all persons receiving money toward preaching the gospel while so engaging in acts of wor-

ship of Almighty God or in religion, must procure a license from the city and pay therefor the annual or daily fee" of the stated sum. No person would suggest that such a law is constitutional. All will admit that such a law is unconstitutional. Yet if this Court sustains the law attempted to be applied here, it will in effect say and do that very evil thing.

The activity of Jehovah's witnesses in distributing their literature is admittedly a "religious rite", i. e., their way of preaching the gospel. The court cannot question this because the fundamental law conclusively precludes this Court from finding otherwise. See the Virginia Statute for Religious Freedom quoted by this Court with approval in *Reynolds* v. *United States*, 98 U. S. 145, 162. There it is held that to permit the court to intrude itself into the field of "religious" opinion would make uncertain religious liberty, which would depend entirely on the religious "complexion" of the members of the court. If the Court had the same "complexion" as the practitioner before it then liberty is granted; if not, it is denied. See the Kansas Supreme Court's words on this in *State* v. *Smith*, 127 P. 2d 518, to wit, "We are not impressed with the suggestion that the religious beliefs of appellants and their children are unreasonable. Perhaps the tenets of many religious sects or denominations would be called reasonable or unreasonable, depending upon who is speaking."

To permit licensing of a preacher as a condition precedent to receiving contributions to sustain him to preach further is identical with licensing of preaching itself. It chokes off the sustenance thereof. The hair-splitting dissection of the protected right so as to sustain the license tax finds no support in law, reason or fact.

To permit or to encourage application of this type of ordinance to the activity of preaching the gospel by

Jehovah's witnesses is to regulate "church" and ultimately permit politicians and others to establish through some such regulation a *state religion*, i. e., by requiring the license, for those not desired by the state would be suppressed and only the one or those religions pleasing to the particular faction in power at the time could exist or operate. Thus the people of America would be pushed back into the miserable condition of intolerance, lethargy and indolence of the Dark Ages from which founders of this "land of liberty" fled during the reign of King James. All tendencies to accomplish a joinder of "church and state", either directly or indirectly, should be nipped in the bud. The sedulous avoidance by America of any move toward joinder of "church and state" is discussed in *The Encyclopedia Americana*, Vol. 6, pp. 660, 657-659; and in the *Columbia Encyclopedia* (Columbia University Press). See *The Catholic Encyclopedia*, Vol. 14 (1912), pp. 250-253.

The position asked for by respondents in this matter clearly discriminates in favor of recognized religious clergymen, against the "poor and weak" servants of Jehovah God, preaching in the same manner as did Jesus. This discrimination cannot be screened for long. The fair judicial mind also rebels against taxation to prohibit and impair the spread of the Gospel even though it is controversial and runs counter to established notions of some persons in the community. It should be remembered that Christ and His apostles were despised, hated and persecuted and charged with "turning the world upside down and refusing to give tribute to Caesar". The charge was falsely made by the clergy of the day, as history abundantly proves. Will this Court permit Jesus' footstep followers in the present day, Jehovah's witnesses, to be similarly denied

their rights because of the false charges made against them? We submit the answer is "No".

To permit application of the ordinance would directly violate the First and Fourteenth Amendments to the United States Constitution. To require Jehovah's witnesses to obtain the license and pay a tax when all religious clergymen are not required to have a license for preaching in a manner pleasing to their conscience, is plain, bald discrimination. In spite of wide unpopularity caused by pressure groups within the nation, Jehovah's witnesses are entitled to the same protection under the law as the religious clergy of recognized denominational sects.

There is only one circumstance which warrants interference with one's religious activity or exercise and that is expressed in *Watson* v. *Jones*, 80 U. S. 679, 728:

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

No such condition exists here. It is not contended that the ordinance is drawn or aimed or applied to curtail any such improper conduct. We submit that no exception exists here that permits interference in any way by any means of the petitioners' rights to worship Almighty God. See *Donley* v. *Colorado Springs*, 40 F. Supp. 15.

The taking of money contributions cannot be segregated from the distribution of literature so as to tax the contribution without in effect strangling or cutting off

the circulation and distribution itself. One doing good, such as petitioners, by constantly distributing "without price" literature on subjects of great importance which is for the benefit of the public is entitled to let those receiving the information aid in keeping the "good work alive and going" by contributing a small sum with which to print more like literature. It is a ridiculous stalemate to hold that one must go bankrupt by forced free distribution or payment of excessive taxes as a condition precedent to exercise his "inalienable rights" protected by the Constitution. Such a reprehensible contention if permitted to stand means the "death toll" to all "four" freedoms for which America is now fighting.

The taking of money contributions, while incidental to their primary aim of encouraging the recipient to study the printed message is a necessary integral part of the entire act of worship which is protected in the same manner as the transaction of the recognized clergy in their solicitation of money contributions from the pulpit.

The only difference between methods of the recognized religious clergy and the way Jehovah's witnesses preach is that the clergy require the people to come to their buildings and edifices to hear a sermon after making a contribution, whereas Jehovah's witnesses carry the message, printed sermons, to the people. Thus they preach as did the Lord Jesus Christ and His apostles (Luke 13: 26; Acts 5: 42; 20: 20), receiving free-will offerings as they go preaching (Luke 8: 1, 3) to honest people of righteousness who do not attend any church. In the United States today there are millions of persons who are honest and of good-will toward Almighty God who do not belong to any church or who, because of various circumstances, are unable to attend the meetings held weekly in the edifices of the

religious clergy. Those millions constitute the great majority of the American people. This great multitude would receive no spiritual food whatever unless it is brought to such persons by Jehovah's witnesses at their doors, or supplied to them on the streets, which spiritual food they can take to their homes and assimilate at a time convenient to them. This situation presents not only a great public necessity but the opportunity to such persons to receive God's revealed word in permanent form of Watchtower publications to study quietly in their homes. The Court cannot properly confuse petitioners' activity, therefore, with commercial activity.

It cannot be argued that because the clergy confine their preaching to oral sermons in church edifices, a proper place, that on the streets or publicly is improper place. To hold thus would be to rule out the way of Christ and His apostles, whom all true ministers are counseled to follow. (1 Peter 2: 9, 21) Also this Court has held that the streets as well as from house to house are the most convenient places and have been used for centuries as the natural and proper places to contact the people in the exercise of fundamental liberties. *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *C. I. O.* 307 U. S. 496; *Cantwell* v. *Connecticut*, 310 U. S. 296.

It is a bald discrimination in the ordinance in that one who is financially unable to give away literature free of charge is not required to procure a license and pay the tax while he who accepts money contributions to aid toward bearing part of the expense of carrying on his charitable work is compelled to submit to the unlawful burden imposed by the ordinance. This permits the people to be divided into two classes. One class will be too poor to give literature away free of charge and if such receive aid to keep the good work alive they will be prosecuted for failure to get a license. The

other class, who are wealthy, can give away pamphlets free of charge and will have the prerogative of the exclusive right of free press and free worship of Almighty God and not be subject to the license tax law here involved. In this the ordinance permits of discrimination of the worst kind. Thus the ordinance violates the Fourteenth Amendment to the United States Constitution.

For a further discussion of why the ordinance is void because of discrimination we here refer to pages 21 to 25, supra, and cases there cited.

In *Fetter* v. *City of Richmond*, 142 S. W. 2d 6, decided by the Missouri Supreme Court it was held that a license tax of $5 per day, $50 per month or $100 per year on "peddlers" was prohibitory and hence void and unconstitutional. In the case of *City of Washington* v. *Reed*, 70 S. W. 2d 121, the Missouri Court of Appeals held that a license tax of $4 per day was discriminatory and prohibitory and therefore unconstitutional and void.

Conclusion

For the reasons that the ordinance is unconstitutional because (1) imposing an excessive tax on petitioners' activity, (2) burdening and abridging petitioners' constitutional rights and (3) discriminating between persons of the same class in violation of the Fourteenth Amendment, and that the court below has ruled in favor of its validity, there is here presented a case calling for the exercise of this Court's powers of supervision under Section 240 (a) of the Judicial Code [28 U. S. C. A. paragraph 347 (a)] and Rule 38, paragraph 5 (b), Rules of this Court. There is also involved the important question of jurisdiction of the trial court over the subject matter. To that end this petition for

writ of certiorari should be granted so as to correct the errors complained of here and committed by the court below against the petitioners.

Respectfully submitted,

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